

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Orig affidavit of
Mauler*

77-1216

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1216

UNITED STATES OF AMERICA,

RS
Appellee,

—v.—

CHAIM KAHAN, SOLOMON WERCBERGER
AND MOR WERCBERGER,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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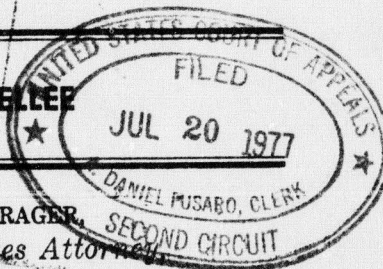


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UNITED STATES OF AMERICA,

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CHAIM KAHAN, SOLOMON WERCBERGER
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Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Chaim Kahan, Mor Werberberger and Solomon Werberberger appeal from judgments of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), convicting them, after a jury trial, of knowingly and unlawfully receiving and having in their possession 5,072 cartons of Schick shaving products, which had been stolen from a motor truck while moving in interstate commerce, in violation of Title 18, United States Code, Section 659.¹ Each of the appellants

¹ Appellants were convicted on Count Two of a two count indictment (75 CR 762). They were acquitted on Count One which charged appellants, together with Vincent "Jimmy" Santa, Stanley Diamond, Manuel Gomez, and others, with conspiracy

[Footnote continued on following page]

was sentenced to a term of three years imprisonment, pursuant to 18 U.S.C. § 4205(b)(2). All are free on bail pending this appeal.

On appeal, appellants do not challenge the sufficiency of the evidence against them. Rather, they argue: (1) that the District Court erroneously admitted hearsay statements of alleged co-conspirators; (2) that the District Court erroneously admitted evidence of a prior similar act by the appellants; and (3) that the District Court erred in denying appellants' motion to suppress the 5,072 cartons of Schick products seized from their warehouse pursuant to a search warrant.

Statement of the Case

A. Introduction

On March 11, 1975 at approximately 9:00 p.m., a Time D.C. trailer-truck carrying 6,910 cartons of Schick products from West Haven, Connecticut to Anaheim, California was hijacked at gun point. The truck, driven by Time D.C. driver Carroll Bridgeforth, was moving south near the intersections of Route 80 and 287 in Parsippany, New Jersey when it was brought to a halt by a tan or light cream colored late model car. Three or four armed men exited the car and approached the truck, forced Bridgeforth's partner, James Lester, from

to receive and possess the same stolen goods in violation of 18 U.S.C. §371. Co-defendant Stanley Diamond entered a guilty plea to the conspiracy count prior to trial. Co-defendants Vincent "Jimmy" Santa and Manuel Gomez were severed before trial, and were subsequently tried on a superseding indictment (77 CR 33(S)) which charged them, together with Joseph DeLuca, James DeFillippo and Patrick DeFillippo, with possession and conspiracy to possess the same goods. All five were found guilty of possession and conspiracy after a jury trial before Judge Mishler in May, 1977; they are awaiting sentence.

the cab of the truck and directed Bridgeforth to turn the truck north towards New York.

After driving north for a short period, Bridgeforth was removed from his truck, pistol whipped, and placed in the rear of the late model car with Lester. Both drivers were forced to lie in the rear of the car with their heads covered for approximately three hours. They were released on Staten Island, New York, shortly after midnight, in the early morning of March 12, 1975. Before being released, Bridgeforth overheard one of the hijackers inform another, after a brief "telephone" stop, that "the buyer was well satisfied with the load" (258a, 259a, 305a).²

Less than two days later, agents of the Federal Bureau of Investigation (F.B.I.) executed a search warrant at the CBS Warehouse, 50th Street in Brooklyn. There they recovered, from the appellants' possession, 5,072 cartons of the stolen Schick products. Chaim Kahan, Mor Werberger and Solomon Werberger, respectively the president, treasurer and secretary of CBS Warehouse Inc., admitted having received the Schick products in separate deliveries on March 12th and March 13th, 1975. Acknowledging that they had joint control of and responsibility for the operation of the premises, appellants claimed to be merely public warehousemen who had accepted possession of the Schick products for "storage" purposes. They were unable to identify the source of the goods in their possession, but did produce a standard form bill of lading and several CBS receipts and internal documents which, they alleged, justified their possession of the Schick products which they were "storing". The documents they produced, Government Exhibits 2, 2A-2E

² Unless otherwise indicated, parenthetical page references are to the Appellants' Appendix.

and 3 (1110a-1123a) indicated that 1,606 cartons of the Schick products had been received by appellants on March 12th, consigned to the "International Trading Co.", and an additional 3,032 cartons had been received by appellants on March 13th, consigned to the "International Trucking Co.".

As a result of appellants' acknowledged possession of the goods; their possession of 5,072 cartons on documentation authorizing possession of only 4,638 cartons;³ the unreasonable nature of their proffered explanation; and the fact that the F.B.I. had removed a prior shipment of stolen products from appellants' possession just five weeks earlier,⁴ appellants were arrested for violation of 18 U.S.C. § 659.⁵ They were subsequently indicted for pos-

³ The standard form bill of lading which appellants claimed to have received from the delivering driver on March 12th showed that 1,654 cartons of razors and blades were received. The internal CBS documents showed that 1,606 cartons were actually received on March 12th. According to CBS documents, 1,606 and 3,032 cartons were received for a total of 4,638. If the 1,654 figure from the bill of lading is utilized rather than appellants' internal documents, they would have had paper work covering 4,686 (1,654 and 3,032) cartons. Neither figure approaches the 5,072 cases of Schick products actually recovered from appellants' warehouse.

⁴ On February 4, 1975, F.B.I. agents discovered in appellants' warehouse 1,184 cartons of stolen Whitehall Laboratory products, which had been shipped from Hammonton, New Jersey to Dallas, Texas on January 30, 1975. Appellants were advised that the goods were "stolen" (850a). They were not arrested at that time. The goods were actually seized the following day on a search warrant.

⁵ In a footnote at page 11 of their brief, appellants imply that the FBI agents had some doubt about arresting appellants for their possession of the stolen Schick products and that the arrest was only at the instance of the United States Attorney. This is wholly misleading since, as a general practice, an arrest is not usually made until the United States Attorney is contacted.

session and conspiracy to receive and possess the stolen Schick products found in their possession on March 13, 1975.

At trial, the appellants did not dispute that the Schick products removed from their warehouse on March 13, 1975 had in fact been stolen from interstate commerce on March 11, 1975. Nor did they contest their possession of the stolen goods. The sole issue framed by the defense from the outset concerned appellants' knowledge that the goods were stolen.

8. The Government's Case

The theory of the government's case, on both the possession and conspiracy counts, was that the appellants were more than innocent warehousemen when they possessed the stolen Schick products. Rather, the government presented evidence that appellants had guilty knowledge at the time of possession and were, in fact, part of a broader conspiracy to receive and possess the stolen goods, which had been hatched prior to the hijacking at 9:00 p.m. on March 11th. The government's theory was essentially based on the nature and timing of the appellants' receipt of the stolen goods, their explanations and the documents which they offered in support thereof, evidence of their prior dealings with the same source of stolen goods, and co-conspirators statements which evidenced appellants' roles as purchasers of the stolen Schick products.

1. Hijacking and Delivery

After Time D.C. truck driver Carroll Bridgeforth testified as to the 9:00 p.m. hijacking and the 11:30 p.m. statement of one of the hijackers that "the buyer was well satisfied with the load" (295a), the government

called Paul Pollari, an F.B.I. informant, who participated in the unloading of the hijacked truck on March 12th and 13th. Pollari testified that he received a telephone call from Jimmy DeFillippo at 7:30 p.m. on March 11, 1975, an hour and a half before the hijacking. He was told that there would be "work to do in the morning".

At 7:00 a.m. on March 12th, Pollari met with Jimmy and Patty DeFillippo and Manny Gomez.⁶ The four of them went to Tony's Gulf Station at Rockaway and Atlantic Avenues, where Manny Gomez rented three vehicles: two 18-20 foot straight trucks and one van. Using the three trucks, Pollari, Gomez and the DeFillippos then proceeded to the Zimco truck lot on McGuinness Avenue in Brooklyn, where they met with Jimmy Santa and Joe DeLuca. There, hidden in the middle of thirty to forty trailers, was Time D.C. trailer "1047" which both Pollari and Bridgeforth identified as the stolen trailer. When Pollari first observed the stolen trailer, it was filled with cases of Schick products (314a, 336a).

For approximately two hours, Pollari assisted Santa, DeLuca, Gomez and the DeFillippos in the unloading of the stolen truck. They moved the stolen Schick products from Time D.C. trailer to the rental trucks Gomez had obtained. Santa then gave Gomez and Pollari a standard

⁶ On March 10, 1975 Manuel Gomez rented a 1975 Plymouth bearing New York license 738 ZAO from the National Car Rental in Jamaica, Queens. The car, pictured in Govt. Ex. 7, was due back on March 12th (615a-617a). Time D.C. driver Carroll Bridgeforth testified that the "late model" car which was rented by Gomez "very conceivably could have been the car" in which he was held during the hijacking (291a). On March 12, 1975 Gomez himself told government informant Thomas Cogar that the car had been used "to pull a \$500,000 score". (524a) Two days later, Gomez told Pollari the car had been used "on the razor blade job and he wanted to get rid of the car" (525a).

form bill of lading (Govt. Ex. 10) and told them to take the first truckful of Schick products to the S & F Warehouse, Bldg. 77 at the Brooklyn Navy Yard.⁷ At the same time, Santa told Jimmy DeFillippo to take the second truck to CBS Warehouse. (316a, 325a).

At 5:30 p.m., Gomez and Pollari returned to the Zimco lot. Together with Santa and DeLuca, they reloaded their rental truck. Santa told Pollari that he and Gomez would be taking the loaded truck to the CBS Warehouse the next day. (330a).

On the evening of March 12th, Pollari informed the F.B.I. that Santa had the Time D.C. truck and that the Schick products had been put in the CBS and S & F warehouses that day. Pollari informed Special Agent Pecoraro that the remaining goods were going to the CBS warehouse on March 13th.

Acting on the information received from Pollari, the F.B.I. set up surveillance on the CBS warehouse on the morning of March 13th. At about 11:45 a.m., Special Agent Dowd observed Gomez and Pollari arrive at the CBS warehouse in a 20 foot Hertz straight truck. Gomez got out and had a conversation on the loading platform with Jacob Fisher, an employee of CBS. Fisher then entered the warehouse and a few minutes later Mor Werberger came out to speak with Gomez. Gomez then returned to the rental truck, pulled it to the platform, and began unloading Schick products onto pallets on the platform. Agent Dowd observed Chaim Kahan and Solomon Werberger join Mor Werberger on the platform where all three appellants "participated in the offloading of the merchandise" (352a).

⁷ On March 13, 1975 the F.B.I. recovered 1,784 cartons of the stolen Schick products from the S & F warehouse. They also recovered the standard form bill of lading which Pollari testified he had received from Jimmy Santa.

Shortly after noon, Agent Dowd observed two vans arrive in the CBS parking lot. They were driven by Patty and Jimmy DeFillippo. As soon as they arrived, "Mr. Mor Werberger, Mr. Chaim Kahan and Mr. Solomon Werberger went over to these two vans", opened the doors and "examined the contents" (353a). Dowd testified that the unloading of the truck and two vans took about three and a half hours and was completed about 4:00 o'clock that afternoon. Chaim Kahan and Mor Werberger participated in the unloading of the vans. Solomon Werberger left the premises shortly after the vans arrived.

2. Seizure and Arrests

Approximately 30 minutes after the unloading was completed, and after Gomez, Pollari and the DeFillippos had left the premises, Agent Colgan arrived on the scene with a search warrant he had obtained from the United States Magistrate for the Eastern District of New York. He and six other agents then entered the CBS Warehouse to execute the warrant. After locating and positively identifying 5,072 cartons of the stolen Schick products by specification number, the agents interviewed Chaim Kahan and Mor Werberger.⁸

Both Agents Dowd and Colgan interviewed Chaim Kahan, who said that CBS had received the shipments of the Schick products on the 12th and 13th. He stated that the goods had been received from "International Trading Co.", and that they had a bill of lading for the shipment received by CBS on the 12th (359a, 397a). Kahan admitted that they had no paper work for the

⁸Solomon Werberger had departed the premises earlier in the afternoon. He returned to the warehouse at about 5:30 p.m. after being telephonically summoned.

shipment which arrived on the 13th (362a, 398a). He advised the agents that CBS often stored merchandise for truckers "off the street", and claimed that the Schick load had, in fact, come in "off the street" (360a). Kahan told Colgan that when an unknown trucker would come in off the street and drop merchandise without paper work, which he stated did happen, the firm "gives a complete and accurate receipt of the goods obtained from the truckman" (399a).

Mor Werberger then provided Agents Colgan and Dowd with the supporting paperwork, which he claimed authorized their possession of the stolen Schick products. He produced the bill of lading (Govt. Ex. 2) which he said they had received from the driver who delivered the Schick products on March 12th. The standard form bill of lading merely indicated "1,654 razors and blades" consigned to "International Trading Company" (401a). The receipt, which Mor Werberger allegedly issued the driver for the Schick products received by CBS on March 12, 1975, was also produced (Govt. Ex. 2A). It simply stated "International Trading" and "one load blades". No carton count was contained on the alleged receipt. *Id.*

When questioned about documentation in support of the remainder of the Schick products found at CBS, Mor Werberger produced Govt. Ex. 3, which he explained was the receipt he gave to the driver for International Trading when CBS received 3,032 cartons of Schick products on March 13th. The receipt—a CBS form—indicated the 3,032 cartons, without specifying the type of goods. The 3,032 cartons were consigned to "International Trucking". No bill of lading was produced for the March 13th delivery.

3. Prior Similar Act

As noted above, the March 13th seizure of the Schick products did not represent the first occasion on which appellants had been found in possession of stolen goods. The jury heard evidence that on February 4, 1977, approximately five weeks earlier, agents of the F.B.I. discovered 1,184 cases of Whitehall Laboratory Products which had been stolen while moving from New Jersey to Dallas, Texas. At that time, the appellants had been advised that the Whitehall products were stolen. Mor Werberger had produced Govt. Exhibit 6 as the bill of lading which CBS received with the Whitehall shipment.

Handwriting analysis of the documents obtained from CBS conclusively established that portions of the March 12th bill of lading, accompanying the stolen Schick shaving products, were written by the same person who filled in the bill of lading accompanying the stolen Whitehall products found in appellants' possession on February 4th (600a). Similar portions of the S & F bill of lading (Govt. Ex. 10), which Pollari received from Jimmy Santa on the morning of March 12th, were also in the same handwriting (605a).

4. Co-conspirators Statements

Testimony as to co-conspirators' statements shed significant light on both the nature of the appellants' possession of the goods in question and the extent of their association with the individuals from whom they received the stolen Schick products.

Pollari testified as to the events which occurred immediately after delivery of the stolen goods into the CBS Warehouse on March 13th. After returning the rental vans, he and Jimmy and Patty DeFillippo went

to the area of Roberts Lounge on Lefferts Blvd. in Queens, a known hangout for the hijacking crew upon which he was informing. They met at Tommy "Wheels" DeCandia's house with Jimmy Santa, Joe DeLuca and Santa's partner, John Savino. Upon arriving, they were told by Santa that "the F.B.I. had hit the place, C.B.S., ten minutes after [you] left" (342a). Pollari then asked Santa if they had anything to worry about. Santa said, "no, it's on their end". *Id.*

Thomas Cogar, another government informant operating within the Robert's Lounge crew,⁹ then testified as to conversations to which he was privy during the week of March 12th to March 19th, 1975. During that period Cogar had been paid by the government to gather information concerning the crew which operated from the Leffert's Dress Shop and Tommy DeCandia house (collectively known as Robert's Lounge). Cogar testified that during this period he was "unloading hijacked trucks and disposing of goods" with "all people in this Lefferts Dress Shop and Roberts' Lounge" including "Jimmy Santa" and "Stanley Diamond" (528a).¹⁰ These activities were reported regularly to the government (531a-537a).

Cogar stated that on the morning of March 14, 1975, the day after appellants were arrested, he was "stretching material" in the Lefferts Dress Shop. Jimmy Santa and Stanley Diamond were present. Santa was reading a newspaper. He handed the paper to Diamond and said "What do you think of the Rabbis?" Diamond replied "Don't worry, don't worry, they're stand up people".

⁹While the agents were aware of the dual infiltration of this hijacking crew, neither Pollari nor Cogar knew of the others' status (526A).

¹⁰ This information, prejudicial as it was, was elicited by the defense on cross-examination of Cogar.

Cogar later looked at the article Santa and Diamond were reading. It had to do with "the hijacking of Schick Razor Products" (518a). When asked by Cogar if "they were really rabbis that the government arrested", Diamond replied "No, they're orthodox jews, they wear black hats and beards" (521a). Later, Diamond again assured Santa that "they're tough people, they won't get anything out of them". *Id.*

On March 19th, Cogar was present during another conversation between Diamond and Santa. Santa said he was "going to see them, the rabbis, on Saturday about getting the rest of the money". Diamond later said that the money they had gotten previously from the "rabbis" had been in hundred dollar bills with wrappers bearing the Star of David. (522a).

Chief Judge Mishler permitted Cogar's testimony as to the co-conspirators statements after finding evidence to support the government's theory that the appellants were part of a conspiracy which began at or before the time of the hijacking and continued after the arrest of appellants. Finding further evidence to support a jury finding that Santa and Diamond were members of the conspiracy, of which the appellants were a part, and that the conspiracy had as one of its objectives the payment for the goods (493a), the Court held:

"Conversations concerning payments made or had outside the presence of those accused may be offered, because they were made during the conspiracy and in furtherance of the objectives of the conspiracy . . . the conspiracy was to receive and possess the merchandise and of course, pay for it" (494a-495a).

C. The Defense Case

Each of the appellants testified. They repeated much of what they had told the F.B.I. on March 13th. They claimed they were innocent warehousemen and testified in detail concerning their business operation. Each admitted equal responsibility for and knowledge of the presence of the Schick products. They claimed no knowledge that the goods were stolen; nor did they know Jimmy Santa, Stanley Diamond or Manny Gomez.

During their trial testimony, both Mor Werberberger and Chaim Kahan contradicted the F.B.I. agents as to material matters. Mor Werberberger claimed that Agent Colgan had not, in fact, informed him that the Whitehall products were stolen goods when the goods were seized on February 4th. Chaim Kahan testified that because of his job function—as president of the company—he did not personally receive the Schick products and was not, on March 13th 1975, familiar with the number of cases of Schick products which had been received at CBS the day before. Nor had he gone out to examine the vans when they arrived at CBS on March 13th.

D. Suppression Hearing

A pretrial suppression hearing was held to determine the nature of any misstatements which might have been made to the Magistrate in the affidavit for the March 13th search warrant.¹¹ Agent Patrick Colgan, the affiant, tes-

¹¹ Chief Judge Mishler had previously held the affidavit sufficient on its face (160a-164a). In preparation for trial the government discovered that the recollection of the informant, who was available to testify, differed as to the events of March 12th. While the affidavit stated that the informant was personally present in the CBS warehouse on March 12th and observed therein several thousand cartons of Schick blades, it was discovered prior to trial that the informant's information was not based upon personal observation on March 12th, but rather on co-conspirators' statements. Since the apparent discrepancy was reflected in the affidavit, the possible misstatement was immediately brought to the attention of the Court and counsel.

tified that he was in the United States Attorney's Office in the Eastern District of New York on the morning of March 13, 1975. Between 11:45 p.m. and 12:30 p.m. he received a call from Agents Dowd and Pecoraro requesting that he obtain a search warrant for the CBS Warehouse. Colgan was familiar with the March 11th Schick hijacking at the time.

Colgan was informed by Agent Pecoraro that a confidential informant, whose previous reliability is not questioned, had helped unload the stolen Time D.C. trailer containing the Schick products the day before. Colgan was further told that the informant had delivered a truckload of the Schick products into the CBS and had supplied the number "0240" as being on a large number of cartons delivered to CBS (189a-190a). After checking with the New Haven, Connecticut office of the Federal Bureau of Investigation, and being informed "that that number [0240] was definitely part of the shipment of Schick products which had been hijacked in New Jersey" (191a), Agent Colgan swore to the instant affidavit. (Govt. Ex. 1). Colgan testified that the information which he conveyed to the Magistrate on March 13, 1975 was true and correct to his knowledge (192a).

Agent Pecoraro also testified at the hearing. He related that he had received a call from his confidential source (Paul Pollari) at 11:00 p.m. on March 12, 1975. The source told him that "Jimmy Santa" had the hijacked trailer of Schick products, and that he (Pollari) had "worked for him today unloading it" (252a). When asked where the truck was located, the source said it was in Brooklyn, and that "we took two loads out today, we took one to CBS and [one to S&F]" (252a-253a). The informant further stated that he was taking another load to CBS the following day. *Id.*

Together with other agents, Pecoraro met with the informant at 7:30 a.m. on the morning of March 13th (254a). The informant repeated what had been said

the night before. Pursuant to standard procedure, Pecoraro asked the informant if he had obtained any identifying markings from the cartons. The informant could only remember the numbers "0240" which he said appeared on "thousands" of cartons.¹² This information was conveyed to Agent Colgan. Pecoraro testified that when he spoke to Colgan on March 13, 1975, he believed the confidential source had personally delivered thousands of cartons to CBS on March 12th (262a-263a). He testified that he learned on the Friday before trial, in January of 1977, that the informant had gone to S&F and not CBS on the 12th (263a).

Agent Pecararo further testified that while on surveillance at CBS on March 13th, he and Agent Dowd observed the informant, Pollari, together with Manny Gomez and the DeFillippos delivering the Schick products to the appellants. The agents actually watched the delivery taking place between 11:45 a.m. and 4:00 a.m. on the 13th. (268a).

The search warrant was actually obtained from the Magistrate at about 4:00 p.m. (246a). It was executed at approximately 4:30 p.m.

After hearing all the testimony, Chief Judge Mishler denied the appellants' motion to suppress. The Court reiterated its earlier finding that the affidavit was "sufficient in form and substance", and concluded that any misstatements to the Magistrate were the result of misinterpretation. Indeed, the Court specifically found that the misinterpretation was non-negligent, the agents having acted reasonably in interpreting Pollari's information as they did (418a).

¹² The representative of Warner Lambert testified that the March 11th shipment contained 6,910 cartons, including 2000 cartons of "super two razors" bearing "specification" or "item" number "0240." (465a). All 2000 cartons of "0240" blades were found in CBS warehouse on March 13th (457a, 1129a).

ARGUMENT**POINT I****The District Court Properly Admitted Cogar's Testimony As To Statements Of Co-Conspirators Made During The Course Of And In Furtherance Of The Conspiracy.**

Appellants initially challenge the ruling of the District Court admitting, with limiting instruction, Cogar's testimony as to the March 14th and March 19th statements of the appellants' alleged co-conspirators, Santa and Diamond.¹³ Urging the admission of such evidence to be reversible error, appellants allege that such statements, made after appellants had been arrested, were neither made during the course of any conspiracy nor in furtherance of it. In support of their position, appellants intertwine the following arguments, among others: (1) that the challenged hearsay statements were the only evidence "tending directly to demonstrate" that appellants had knowledge that the Schick products were stolen; (2) that the statements, made after appellants' arrests, were made at a time when the appellants could not have been part of any conspiracy; (3) that in face of the indictment, which charges appellants with receiving and possessing the goods, evidence that they were "purchasers" constituted a prejudicial variance; (4) that there was no other evidence that appellants were purchasers of the stolen goods; (5) that as purchasers, the appellants could not have been co-conspirators with the sellers from whom they received the stolen goods; (6)

¹³ It should be noted at the outset that appellants are appealing their convictions on the charge of possession. They were acquitted on the conspiracy charge. Appellants' brief does not suggest that the evidence, independent of the co-conspirators' statements, was insufficient to establish that their possession of the stolen Schick razors was with guilty knowledge.

that statements made by Stanley Diamond were not co-conspirators statements, there being no evidence that Stanley Diamond was a member of the conspiracy.

Appellants' arguments misconstrue the applicable law and misapprehend the evidence in the record on appeal.¹⁴

(1)

The codification of Rule 801(d) (2) (e) of the Federal Rules of Evidence¹⁵ places beyond dispute the proposition that statements by co-conspirators during the course of and in furtherance of the conspiracy are not "hearsay", and may be introduced against a party alleged to be a

¹⁴ Several of appellants' arguments are so specious that they do not warrant a textual response. One such argument is appellants' claim of "prejudicial variance". They do not argue that the government failed to prove appellants' receipt and possession of the Schick products. Rather, it is suggested that proof of "purchase" in face of an indictment charging unlawful "possession and receipt" constituted a prejudicial variance. The argument is patently absurd. It is analogous to an argument by a defendant charged with manslaughter that he was prejudiced by proof establishing premeditated murder. That the proof is broader than the crime charged does not constitute a prejudicial variance. It is only where the proof fails to establish the crime charged that a variance occurs. See *United States v. Russano*, 257 F.2d 712 (2d Cir. 1958).

Nor were the appellants surprised by the proof of "purchase", as appellants' brief implies. It is clear from the record that appellants were well aware that the government's evidence would establish their purchase of the stolen Schick products. Indeed, appellants' trial counsel acknowledged knowing of the nature of the government's allegations of "purchase" for more than a year prior to trial (497a).

¹⁵ Rule 801(d) (2) (e) provides:

Statements which are not hearsay. A statement is not hearsay if —

- (2) The statement is offered against a party and is ... (e) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy."

co-conspirator. The course to be followed when such statements are offered by the prosecution has been clearly delineated by this Court as follows:

"[T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, *by a fair preponderance of the evidence independent of the hearsay utterances being offered*. If it has, the utterances go to the jury for them to consider along with all other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt" (emphasis added).

United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, *sub nom. Lynch v. United States*, 397 U.S. 1028 (1970); *see also United States v. Stanichich*, 550 F.2d 1204, 1297-98 (2d Cir. 1977); *United States v. Ragland*, 375 F.2d 471 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

The instant record contained sufficient evidence, independent of the hearsay utterances, to establish that appellants were participants in the conspiracy to receive and possess the Schick products. Independent evidence established that the \$400,000 in shaving products, stolen in New Jersey at 9 p.m. on March 11, 1975, were delivered to the appellants the next morning.¹⁶ That the appellants' receipt and possession of the stolen goods was in the capacity of co-conspirators, rather than as innocent warehousemen, was established by their explanations, both in and out of court, and the documents they offered in support of their possession.

¹⁶ Moreover, the goods were delivered into appellants' possession by Manuel Gomez who, the evidence showed, had rented the car used in the hijacking of the goods just hours before.

Appellants' claimed to have received the Schick products for "storage" from an unknown source. Both Chaim Kahan and Mor Werberger stated that it was not unusual for a driver to come "off the street" with a load of goods of unknown origin. Mor Werberger acknowledged that in a warehouse transaction the most important element is the taking of an accurate count of the goods received. (755a-756a). Since liability turned upon accuracy, appellants' procedure was to count incoming goods on the loading platform before accepting them for storage. (765a). This procedure was stated to be of particular importance when an unknown truckman delivered goods from an unnamed source without a bill of lading—which, it was claimed, happened in this instance.

In light of the above-specified procedures, appellants' possession of the Schick products could hardly be found by the Court and jury to be a legitimate warehouse transaction. The documentation in support of their possession revealed that no count could have been taken when the goods were accepted. The March 12th bill of lading showed that 1,654 cartons had been delivered. But according to internal documents, apparently reflecting a later inventory of the stolen goods they had acquired, appellants actually received only 1,606 cases of Schick products on March 12th. Mor Werberger explained that he was aware of the shortage of 48 cases before the truck driver departed on the 12th, but made no notation of the true count on either the bill of lading or the receipt. This he said was done to protect the driver. (659a). Such an explanation contradicted his own testimony as to the procedure which appellants followed under such circumstances.

Moreover, the documentation established that the remaining cases of stolen Schick products were accepted on March 13th without receiving any paperwork from the truck drivers. Mor Werberger claimed that a receipt reflecting the delivery of "3,032 cartons" was given to

the driver after an accurate count of the goods being received for "storage" on March 13th. (Govt. Ex. 3). The total documentation thus justified the presence of 4,638 cases of the Schick products in the CBS warehouse. 5,072 cases of the stolen goods were found on the premises. Appellants had no explanation for the discrepancy (768a-769a).

Beyond the evidence of guilty possession by appellants just hours after the hijacking, the District Court had before it evidence that the appellants had possessed a similar stolen load from the same source just five weeks before. A representative of Whitehall Laboratories testified that the shipment of Whitehall products which the F.B.I. had seized from appellants' possession on February 5, 1977 was positively identifiable as the goods Whitehall had shipped from its New Jersey plant to Dallas, Texas on January 30, 1975. He further testified that the goods never reached Dallas, Texas. Appellants, who were unable to identify the source of the Whitehall products (713a), had presented the F.B.I. with a bill of lading allegedly justifying their possession of the Whitehall goods at that time. Expert handwriting comparison of the Whitehall bill of lading and the Schick bill of lading conclusively established that they were written by the same hand.¹⁷ The plain inference is that the stolen goods in appellants' possession on March 13, 1975 had been received from the same source as the stolen goods which were in their possession on February 4, 1975.

The independent evidence of the appellants' guilty possession of the stolen goods, and of their prior dealings with the hijackers, clearly placed before the Court suffi-

¹⁷ Handwriting analysis further established that both the Whitehall and Schick bills of lading seized from CBS warehouse were in the same handwriting as the bill of lading which Pollari received from Jimmy Santa on March 12, 1975.

cient evidence to meet the *Geaney* test.¹⁸ Compare *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. Manfredi*, 488 F.2d 588 (2d Cir.), *cert. denied*, 417 U.S. 936 (1973). Accordingly, it cannot be said that Chief Judge Mishler abused his discretion in admitting Cogar's testimony as to co-conspirators' statements.

Nor did the District Court err in submitting the conspiracy count to the jury. Having concluded that a *fair preponderance* of the evidence linked the appellants to the conspiracy charged, the Court could properly submit the co-conspirator statements to the jury for consideration in determining whether all the evidence, including the hearsay utterances, established the appellants' guilt on the conspiracy count beyond a reasonable doubt. See *United States v. Ragland*, 375 F.2d 471, 477-78 (2d Cir. 1967), *cert. denied*, 390 U.S. 928 (1968); *United States v. D'Amato*, 493 F.2d 359, 364-65 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832

¹⁸ The independent non-hearsay evidence required by *Geaney* before admission of statements of a co-conspirator may be totally circumstantial, *United States v. Ragland*, 375 F. 2d 471, 477 (2d Cir. 1967) *cert. denied* 390 U.S. 928 (1968), and the judge, in making his determination as to the sufficiency of the independent evidence, is permitted to draw such inferences as the facts permit. *United States v. Manfredi*, 488 F.2d 588 (2d Cir.), *cert. denied*, 417 U.S. 936 (1973); *United States v. Padilla*, 374 F.2d 996, 998 (2d Cir. 1967). Here, Judge Mishler could reasonably infer from appellants' possession of two stolen "loads" within five weeks, both from the same source, that (1) appellants knew the goods were stolen, and (2) appellants had a working relationship with the thieves. The latter inference follows since it would be unlikely in the absence of such a relationship that the thieves who had lost a 1,184 case shipment to the F.B.I. on February 5, 1975 would have chanced a larger loss just five weeks later by again placing the goods in appellants' warehouse.

(1975).¹⁹ There was ample evidence in this record upon which the jury could have found appellants guilty. That the jury ultimately acquitted on the conspiracy count does not affect the admissibility of the co-conspirator statements. *Cf. United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977).

Appellants contend that the District Court committed reversible error in any event by admitting Cogar's testimony as to co-conspirator statements, which, it is argued, were not made during the course of or in furtherance of any conspiracy of which they were a part.²⁰ The state-

¹⁹ Actually, in submitting the co-conspirators statements to the jury, the Court provided appellants with an undue advantage. Holding the government to a higher burden of proof than this Circuit requires, Chief Judge Mishler charged the jury that the government must first establish, by independent evidence and "beyond a reasonable doubt," that the appellants were members of the conspiracy before the jury could use the acts and declarations of co-conspirators against them (1042a-1043a). That specific charge has been criticized by this Court as rendering the co-conspirator exception without value. *United States v. Dennis*, 183 F.2d 201, 231 (2d Cir. 1950) *aff'd on other grounds* 341 U.S. 494 (1951); *United States v. Ragland*, 375 F.2d 471, 479 (2d Cir. 1967), *cert. denied*, 390 U.S. 928 (1968). As Judge Learned Hand said in *Dennis*:

It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what the jury had already decided. 183 F.2d at 230-31.

In face of the charge given, and the jury's acquittal of appellants on the conspiracy count, it is difficult to perceive any prejudice to the appellants as a result of the admission into evidence of the co-conspirators' statements.

²⁰ In support of their contention that the co-conspirators' statements were made after the conspiracy had terminated, appellants repeatedly misstate the record. One such misstatement occurs at page 30 of appellants' brief where it is claimed that the District

[Footnote continued on following page]

Court "squarely noted" that the conspiracy had concluded at the time the FBI entered appellants' warehouse and located the stolen razor blades. In support of that statement, appellants quote, out of context, an instruction Judge Mishler gave the jury concerning the use of Chiam Kahan's statements to the FBI. That the quoted passage has nothing to do with the continuation of the conspiracy is clear when read in context. Indeed, Judge Mishler, a few pages later, specifically stated that he was not implying that the conspiracy had ended when the FBI entered the CBS warehouse (363a-366a).

Another glaring misstatement of the record appears at page 41 of appellant's brief. Here again, in connection with the Court's preliminary ruling that a jury could find a continuing conspiracy, appellants inaccurately represent the record. Appellants' brief states:

"The Court then demanded to know what 'circumstantial' evidence [of purchase] was being referred to. The prosecutor could only point (490a) to the fact that Mr. Bridgeforth, the truck driver, had testified that he heard one of his abductors say, 'The buyer was well satisfied with the load' (295a). On this basis, the Court ruled that the evidence was admissible. . ." (App. Brief p. 41).

A reading of page 490a of the transcript reveals that the prosecutor's proffer of circumstantial evidence of purchase by appellants was not so limited. It was defense counsel who sought to limit the District Court's consideration to the driver's testimony. The government's argument was broader:

"That begins it, that the buyer is well satisfied, and 12 hours later the goods [were] being delivered into the warehouse of these defendants, being delivered in there by Manny Gomez, among other people, who the government will prove, will show, rented the car that was used in the hijacking.

It's so closely wound in together, that based upon the evidence, plus the documents that the defendants produced to show their rightful possession allow the jury to conclude that they didn't merely store these goods, but that they were involved in the conspiracy to hijack the truck, as well as possess the goods."

Indeed, at the point, defense counsel conceded that the co-conspirators statements being offered would be relevant to a conspiracy such as that argued by the government (491a).

ments under attack are the March 14th and March 19th statements of Stanley Diamond²¹ to the effect that the "rabbis" were "stand-up people who paid Santa and Diamond for the "razors" with new hundred dollar bills in wrappers bearing the "Star of David"; and Jimmy Santa's March 19th statement to Diamond that he was meeting with the "rabbis" the next week "about getting the rest of the money." Appellants' arguments have several predicates. First, relying on *United States v. Zeuli*, 137 F.2d 845 (2d Cir. 1943); *United States v. Ford*, 324 F.2d 950 (7th Cir. 1963) and *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969), they contend that as "purchasers" of the stolen goods they could not have been co-conspirators with the "sellers" thereof. Second, appellants argue that even if they were co-conspirators with the hijackers, the March 14th and March 19th statements of Santa and Diamond occurred after the conspiracy had terminated, or were otherwise not in furtherance of that conspiracy, citing *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); and *United States v. Smith*, 520 F.2d 1245 (8th Cir. 1975). Appellants' arguments totally disregard the evidence in this record.²²

Appellants' reliance on *Zeuli*, *supra*; *Ford*, *supra* and *Varelli supra* is misplaced. Those cases do support the proposition that a buyer and seller of stolen property can transact business without complicity in a conspiracy. The rule is predicated upon the dissimilarity of intent

²¹ Appellants also erroneously argue that the jury could not consider the properly admitted co-conspirator statements during their deliberations on the substantive count (Appellants Brief p. 22). The law in this Circuit is clear that a jury may consider properly admitted statements of co-conspirators as competent evidence, even in the absence of a conspiracy charge. See *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977).

between the parties. As the Seventh Circuit stated in *Ford, supra*, 324 F.2d at 952: "[T]he buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective". In the absence of a joint or common objective, the essential element of conspiracy—agreement—has been found lacking. The requisite similar intent arises, however, when there exists between the parties some "prior or contemporaneous understanding beyond the mere sales agreement". *United States v. Ford*, 324 F.2d at 952. See also *United States v. Mayes*, 512 F.2d 637, 647 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975); *United States v. Cook*, 461 F.2d 906, 910 n.3 (5th Cir.), *cert. denied*, 409 U.S. 949 (1972).²²

Here, there was evidence that the appellants and the hijackers had a "prior or contemporaneous understanding beyond a mere sales agreement". As Chief Judge Mishler stated: This was "not solely a seller and buyer deal." Rather,

"[t]here is proof here that these defendants were part of the scheme to hijack and to receive the goods . . . There is a prior history of it, with the same people, and there is an indication that as soon as the goods were hijacked they were delivered to the defendant[s] from which you may reasonably infer that they were aware and were part of the whole hijacking scheme" (628a).

²² *Zeuli* and *Varelli*, similarly distinguish from the "buyer-seller" rule, any transaction where there is evidence of more than a mere sales agreement. The *Zeuli* Court looked to the absence of any evidence of complicity in the theft before finding that the buyer was not a co-conspirator. 137 F.2d at 846-47. And, *Varelli* distinguished the mere sales agreement from a factual setting involving multiple purchases from the thieves. Where there is a pattern of dealing, a conspiratorial agreement may be inferred. 407 F.2d at 748.

The record supports the Court's conclusion. Not only did the appellants have possession of a prior load from the same source, but the evidence permitted a reasonable inference that they were aware of the March 11th hijacking as it occurred, and examined or accepted the goods while the victim truck drivers were being held. Since the hijacking occurred at night, and in another state, the appellants' contemporaneous acceptance of the \$400,000 in stolen shaving products evidenced a pre-existing conspiratorial agreement. Under the circumstances, appellants can find no refuge in *Zeuli*, *Ford* or *Varelli*.

Similarly without merit is appellants' contention that any conspiracy of which they were members had necessarily terminated upon their own arrests or upon the seizure of the Schick products. As Judge Friendly noted in *United States v. Borelli*, 336 F.2d 376, 389 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), "[n]either authority nor reason would suggest that imprisonment necessarily shows withdrawal" from a conspiracy. Indeed, citing *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), Judge Friendly held the opposite to be true. *United States v. Borelli*, 336 F.2d at 389. Membership in a conspiracy continues until the unlawful scheme is completed or the member effectively withdraws. Here, appellants' arrests resulted in only one night in jail. They were arrested March 13th and released March 14th. In light of evidence that their conspiratorial activities continued beyond March 19, 1975, a jury could reasonably conclude that their membership in the conspiracy continued.

Nor was the Court required to conclude that the March 13th seizure of the Schick products terminated the conspiracy. On the contrary, the evidence indicates that payment was yet due and owing despite the seizure. According to Santa, whom the jury could reasonably infer was a co-conspirator, a meeting was to be had with the "rabbis" on the Saturday following March 19th to effect

receipt of that payment. Payment being a major objective in most criminal conspiracies, particularly those involving stolen goods, a jury could reasonably infer that the conspiracy was to continue beyond the seizure until payment was received. Consequently, the co-conspirator statements made between the March 13th seizure of the goods and the subsequent payment were statements made during the course of the conspiracy.²³ See *United States v. Annunziato*, 293 F.2d 373, 380 (2d Cir. 1961); *United States v. Floyd*, Dkt. Nos. 76-1462, 76-1463, Slip op. 3495 (2d Cir. May 16, 1977). Accordingly, there was, we submit, sufficient evidence in this record upon which the Santa and Diamond statements of March 14th and March 19th could properly have been found to be "statements of co-conspirators made during the course of and in furtherance of the conspiracy".

The record supports a finding that Santa and Diamond were co-conspirators of the appellants. Jimmy Santa orchestrated the unloading of the stolen Schick products into the appellants hands just hours after the hijacking. It was Santa who provided Pollari with the phony bill of lading, and who advised Pollari, on the evening of March 13, 1975, that the F.B.I. had "hit" the CBS warehouse ten minutes after delivery was completed.²⁴ Clearly, Santa was one of the leaders in the conspiratorial enterprise.

²³ Moreover, a reasonable inference that the conspiracy continued could have been drawn from the very presence of the Schick products at CBS on March 13th. Since seizure of the Whitehall products on February 5, 1975 did not prevent further dealing, a reasonable conclusion could be drawn that the March 13th seizure would be similarly ineffective.

²⁴ That Santa was aware that the F.B.I. "hit" the C.B.S. warehouse before Pollari, and the DeFellis arrived back at DeCandia's house further supports the inference of conspiracy. Though appellants claimed they did not know the source of the

[Footnote continued on following page]

Diamond, who entered a guilty plea to this conspiracy prior to trial, could likewise be found to be a member of the conspiracy charged. He was clearly a member of the Robert's Lounge crew. His presence at the Lefferts' Dress Shop and DeCandia's house during the week in question support that inference. And, Cogar testified that he regularly unloaded hijacked trucks with Santa and Diamond during that period. More importantly, however, Diamond's statements themselves prove him to be a member of the conspiracy. His statements regarding the "rabbis" together with his conclusion, offered the day after appellants' arrests, that "they won't get anything out of them" (521a), evidence, at least, a relationship with the appellants and their plight. Furthermore, Diamond's references to the money already received (522a-523a), and to the further money which Santa was to receive from the "rabbis" after March 19th (522a), indicates that he, himself, was sharing the proceeds of the theft. From those admissions alone, a jury could have concluded that Diamond was a member of the conspiracy.

Moreover, the independent evidence overwhelmingly supports the inference that appellants were the "rabbis" to whom Santa and Diamond were referring in their March 18th and March 19th statements. Appellants are in fact, "orthodox Jews" who "wear black hats and beards." More importantly, appellants were the individuals to whom Santa and company had delivered the stolen Schick products on March 12th and 13th. Stanley Diamond's statements within the next few days concerning the "rabbis" from whom payment was due for the "razors", clearly referred to the appellants.

Schick products, the hijackers were informed of the seizure before the F.B.I. left the premises. The only reasonable inference to be drawn is that appellants were able to contact Santa immediately. This may well have been accomplished by Solomon Werberger who was away from C.B.S. and was telephonically notified of presence of F.B.I. on the premises.

Relying on *United States v. Birnbaum*, 337 F.2d 490 (2d Cir. 1964), appellants finally allege that the Santa and Diamond statements were "narrative" statements which do not fall within the co-conspirator exception. Under the facts here present, *Birnbaum* is inapposite.

In *Birnbaum*, this Court held that derogatory conversations about Birnbaum between co-conspirators, which took place four years after Birnbaum's role in the conspiracy had been completed, could not be said to have had Birnbaum's implied authorization. They did not, therefore, comport with the agency rationale which underlies the co-conspirator exception.

Here, Santa and Diamond's statements do not constitute unauthorized narrative of past facts. On the contrary, it is dialogue during the course of, and natural to, a continuing conspiracy which had yet to achieve a major objective—payment. See *United States v. Annunziato*, 293 F.2d 373, 380 (2d Cir. 1961). The statements, made under the circumstances then prevailing, were the type impliedly authorized by co-conspirators in appellants' positions.²⁵ Accordingly, it cannot be said that

²⁵ This Court's decision in *Birnbaum* reflects the Supreme Court's concern with the potentially expansive nature of conspiracy prosecutions and the Court's determination to limit use of the co-conspirator exception to those statements impliedly authorized on an agency principle, and made during the course of the conspiracy, as inferentially determined from the acts and declarations of the co-conspirators. See *Krulewitch v. United States*, 336 U.S. 440 (1949); *Lutwak v. United States*, 344 U.S. 604 (1952); *Grunewald v. United States*, 353 U.S. 391 (1957); *Dutton v. Evans*, 400 U.S. 74 (1970), in which the Court, in the exercise of its supervisory powers, has refused to apply the co-conspirator exception to statements in furtherance of the concealment of the conspiracy made subsequent to the completion of the main objectives of the conspiracy. Neither *Birnbaum* nor any other authority cited by appellants has held inadmissible the cohesive and instructive communications between co-conspirators which were admitted

[Footnote continued on following page]

Chief Judge Mishler was without basis for his finding that said statements were made during the course of and in furtherance of the conspiracy (493a, 494a495a).

Finally, we submit that even if the District Court erroneously admitted Cogar's testimony concerning the Santa and Diamond statements, such error, under the circumstances here present, should be found harmless. See *United States v. Floyd*, Dkt. Nos. 76-1462, 76-1463 Slip op. 3495 (2d Cir. May 16, 1977).

As noted above, the District Court submitted the co-conspirators statements to the jury for consideration with an express instruction that the statements and acts of co-conspirators could be charged against the appellants only if the jury first found the appellants to be parties to the conspiracy, by independent evidence and beyond a reasonable doubt (1032a-1043a). That charge clearly favored the defense by erroneously holding the government to a higher standard of proof than caselaw requires. *United States v. Ragland*, 375 F.2d 471 (2d Cir. 1967), *cert. denied*, 390 U.S. 928 (1968); *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951). As Judge Learned Hand noted in *Dennis*, the practical effect of such a charge is to render the co-conspirators' statements useless to the prosecution. In face of the District Court's charge, the subsequent acquittal on the conspiracy count, and the jury's obvious disregard of the co-conspirators' statements,

here. The Santa and Diamond statements, made during the course of the conspiracy—before the payment objective had been achieved—were the type of statement which, the jury could infer, were impliedly authorized by appellants in order to insure the continuation of the conspiracy. See e.g., *United States v. Annunziato*, *supra*, 293 F.2d 373, 380 (2d Cir. 1961); *United States v. James*, 510 F.2d 546, 549-550 (5th Cir. 1975); *Cf.*, *United States v. Floyd*, Dkt. No. 76-1462, slip op. 3495 (2d Cir. May 16, 1977).

the appellants cannot show that they were prejudiced by the submission of the statements to the jury. See *Blassingame v. United States*, 254 F.2d 309 (9th Cir. 1959); *Duarte v. United States*, 171 F.2d 971 (5th Cir. 1949); Rule 52, Federal Rules of Criminal Procedure.

Moreover, appellants are appealing from convictions the possession count. The independent evidence in support of appellants' guilty possession of the Schick products was compelling. The inculpatory documentation and explanations offered by the appellants, together with their prior possession of stolen goods, supports the conclusion that, as to the possession count, the admission of the co-conspirators statements was without effect. Accordingly, the appellants' convictions for unlawful possession of the Schick products should be affirmed.

POINT II

The District Court Properly Admitted Evidence of Appellants February 5th Possession Of The Whitehall Products On The Issue of Knowledge.

Appellants next contest the introduction of evidence of their February 5, 1975 possession of the Whitehall products. Judge Mishler permitted the introduction of the evidence as proof of a prior similar crime. Appellants do not dispute the relevance of such a prior similar crime to the issues of their knowledge on March 12, 1975 when they took possession of the stolen Schick products. Rather, they argue that there was no evidence introduced that the Whitehall products were stolen, nor that they possessed them unlawfully. Accordingly, they argue, they were prejudiced by the submission of the issue to the jury. Appellants arguments are wholly frivolous.

The record contains sufficient evidence upon which the jury could reasonably conclude, beyond a reasonable

doubt, that the appellants knowingly and unlawfully possessed the Whitehall products on February 5, 1975. Agent Cogar testified that he discovered 1184 cases of the Whitehall products in the appellants CBS Warehouse on February 5, 1975. Appellants produced a standard form bill of lading (Govt. Ex. 6) as the document accompanying the goods. Agent Cogar then informed appellants at the time of the seizure that the Whitehall products in their possession were stolen goods (850a).

Mr. Devine, a representative of Whitehall Laboratories, then testified that the Whitehall products seized from appellants possession on February 5th were positively identifiable as being the goods shipped by Whitehall from their New Jersey plant to Dallas, Texas on January 20, 1975 (581a). He testified that the shipment, which went out by truck, never reached its destination (577a). The next time Whitehall saw the goods was when the FBI returned them on February 6, 1975.

Finally, handwriting analysis established that the bill of lading seized from appellants on February 5th was in the same handwriting as the bill of lading accompanying the stolen Schick products found in appellants possession five weeks later. The clear inference to be drawn was that both possessions were part of a common scheme or plan with the same source.

Based upon such evidence, appellants are disingenuous when they argue that a *fair preponderance* of the evidence will not support a finding of a prior similar act.²⁶

²⁶ Beyond the evidence produced by the government, the Court and jury could rely on evidence presented by the defendants in determining whether the appellant's possession of the Whitehall products constituted a prior similar crime. Appellants denied knowing the Whitehall products were stolen. Mor Werberger contradicted Agent Cogar and denied that the FBI ever

[Footnote continued on following page]

United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975) cert. denied, 425 U.S. 958 (1976).

POINT III

The District Court Properly Denied Appellants' Motions To Suppress The Evidence Seized Pursuant To Search Warrant Executed At The CBS Warehouse On March 13, 1975.

Appellants finally contend that the District Court erred in denying appellants' motions to suppress the evidence seized pursuant to the search warrant executed at the CBS Warehouse on March 13, 1975. Appellants' raise two contentions: First, it is alleged that the warrant issued on an affidavit containing insufficient facts to establish probable cause to believe that the stolen Schick products were present in the CBS Warehouse on March 13, 1975.²⁷ Second, it is argued that a material

informed him on February 5, 1975 that the Whitehall products were stolen. Thus, according to Werberger, appellants had received no notice from the FBI that the source of the Whitehall products was "storing" stolen merchandise in appellants' warehouse. On cross-examination, Werberger claimed that no one ever returned to the CBS warehouse to claim the stolen Whitehall products. (776a). From this obvious attempt to dissociate themselves from guilty knowledge, the jury could well discredit appellants' testimony concerning their innocent possession of the goods in question, and could, from appellants' testimony alone, find the opposite to be the truth. See *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952); *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969).

²⁷ The affidavit upon which the March 13, 1975 warrant was issued reads as follows:

Patrick F. Colgan, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

[Footnote continued on following page]

Your deponent has reason to believe that there is presently being concealed in the above-described premises a quantity of cartons bearing the name Schnick, [sic] Inc., with the Spec No. 02-40 on the said cartons which cartons have been stolen from Interstate Commerce in violation of Title 18, United States Code, Section 659.

The facts tending to establish the grounds for the issuance for a search warrant for the above-described premises are as follows:

(1) A communication to the Federal Bureau of Investigation from a Mr. James Lester, an employee of Time-D.C. Trucking Corp., of Secaucus, New Jersey, that a trailer owned and operated by Time-D.C. Trucking Corp., and bearing California License Plate No: WY6336 was hi-jacked on March 11, 1975. Mr. Lester further advised taking from the trailer 6,910 cartons of Schnick [sic] razors and toilet products which cartons were being shipped from the Schnick,[sic] Inc., West Haven Conn. to Anaheim, California.

(2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information to the Federal Bureau of Investigation which information has resulted in the arrest of one individual for the theft of approximately Seventy-Five Thousand Dollars (\$75,000) worth of stolen merchandise and who's information has also lead to the recovery of approximately Twenty-Five Thousand Dollars (\$25,000) worth of hijacked property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schnick [sic] super two bonded razors bearing the Schnick, [sic] Inc., Spec No. 02-40 on the cartons.

WHEREFORE, your deponent respectfully request that a search warrant be issued authorizing Special Agents of the Federal Bureau of Investigation to enter in day the premises known as CBS WAREHOUSE, INC., A MULTI-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 58 LOCATED AT THE FOOT OF 50th STREET, BROOKLYN, NEW YORK, and there to search and seize the above-described property to the end that the same may be dealt with according to law.

misstatement in the underlying affidavit requires suppression of the evidence seized. Chief Judge Mishler considered both contentions below and properly denied the motions.

A. The Affidavit Was Sufficient On Its Face.

In the instant case both the Magistrate and the District Court have found that the affidavit provided probable cause to believe that the stolen Schick razor blades were in the C.B.S. Warehouse at the time of the March 13th search. In reviewing a judicial determination of probable cause it is well settled that such decision is accorded deference and will be overturned only if palpably improper. See *United States v. Londono*, Dkt. No. 76-1579, Slip op. 2961, 2970 (2d Cir. April 18, 1977); *United States v. Canestri*, 518 F.2d 269, 273 (2d Cir. 1975); *United States v. Ramirez*, 279 F.2d 712, 716 (2d Cir.), cert. denied, 364 U.S. 850 (1960). A reviewing court "should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner." *United States v. Ventresca*, 380 U.S. 102, 109 (1965); *United States v. Soyka*, 394 F.2d 443, 453 (2d Cir. 1968) (*en banc*), cert. denied, 393 U.S. 1095 (1969); *United States ex rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209, 218 (2d Cir. 1967). "In a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106, 109 (1965); *Jones v. United States*, 362 U.S. 257, 270 (1960).

The affidavit in this case sets forth facts establishing probable cause to believe that the Schick razor blades stolen on March 11, 1975 were present in the C.B.S. Warehouse on March 12, 1975. The affidavit stated that Agent Colgan was advised that a truck carrying 6,910 cartons of Schick razors was hijacked on March 11, 1975. The following day several thousand cartons of Schick

razor blades were observed by a reliable informant in the C.B.S. warehouse. The cartons observed were marked with the specification number [0240] of the goods that had been stolen the day before. The information provided by the informant was based on personal observation. The courts have given repeated recognition to personal observation as a reliable basis for an informant's report. *United States v. Ventresca*, 380 U.S. 102, 110-111 (1965); *Cameron v. Fastoff*, — F.2d —, Slip op. 3369, 3377-78 (2d Cir. April 22, 1977); *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *Untied States v. Viggiano*, 433 F.2d 716, 719 (2d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971).

Thus, on the face of the affidavit, the Magistrate could reasonably conclude that the Schick razors hijacked on March 11, 1975 were present in the CBS warehouse on March 12th. Based upon the affidavit, the issuing Magistrate could reasonably infer, as did the affiant,²⁸ that "Spec No. 02-40" was an identifying number, specifically assigned to the hijacked goods. That the number was later determined to be an "item" number assigned to a particular type of Schick product should not effect the reasonable inference which could be drawn by the magistrate from the information available at the time the warrant issued.

Based upon the government's subsequent concession that the number "02-40" was less specific than originally thought, Judge Mishler considered the warrant in light of that limitation. Even then he found the affidavit sufficient. In a memorandum and order dated July 6, 1976,

²⁸ Agent Colgan testified at the suppression hearing that prior to obtaining the warrant, he checked with his New Haven Office and determined that the number "02-40" was definitely part of the Schick products that had been hijacked in New Jersey" (191a).

the Court found that even the "item" numbers provided sufficient basis for a search. Judge Mishler ruled that the presence of "several thousand" cartons of "Schick super two-bonded razors" in a warehouse the day following the hijacking of the same items was "extraordinary", and gave rise to the reasonable likelihood that they were the same goods. The District Court's conclusion should be affirmed.

"Probable cause" does not, of course, require proof beyond a reasonable doubt. "Where the goods are of a common nature and not unique there is no obligation to show that the ones sought necessarily are the ones stolen but only to show circumstances indicating this to be likely." *Vitali v. United States*, 383 F.2d 121, 122 (1st Cir. 1969). See also *United States v. Roth* 391 F.2d 507 (1967).²⁹ Here the goods were more than

²⁹ In *Roth*, the Seventh Circuit, considered the sufficiency of a warrant which resulted in the seizure of a stolen shipment of "Hamilton Beach Electric Blenders" from a "garage-type warehouse." After the informant's information was discounted as "inherently defective hearsay on hearsay", the Court looked to the portion of the search warrant affidavit which was based upon the observations of an F.B.I. Agent Noonan. The affidavit read in part: "That your affiant has been informed by Thomas Noonan, a Special Agent of the Federal Bureau of Investigation, that Agent Noonan personally observed a large number of boxes bearing the name 'Hamilton Beach' in the premises above-described, and that such boxes were observed through a window by Agent Noonan while he was standing in a public parking lot adjacent to said building." Noting that the affidavit failed to state the date of Agent Noonan's observations, or to specify the type of "Hamilton Beach" product that he observed, the Court held "[t]he statement, therefore, is to imprecise to establish probable cause that what Noonan observed on the defendants premises was the stolen blenders", 391 F.2d at 511.

Here, the affidavit suffers from none of the defects present in *Roth*. The informant's information was, according to the affidavit, based upon personal observations. The affidavit set forth the date of those personal observations, which was one day after the theft; and further specified the exact Schick product observed—"Super blue bonded razors" bearing "Spec No. 02-40."

"common." The specification number reasonably related the goods at CBS to the truck hijacked a day earlier.

In seeking reversal, the appellants seek the "negative or hypertechnical" reading of a search warrant affidavit which the appellate courts have always refused. It has long been recognized that such inflexibility by reviewing courts would discourage rather than advance the proper conduct of law enforcement officers. *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *United States v. Lewis*, 392 F.2d 377, 379 (2d Cir.), *cert. denied*, 393 U.S. 891 (1968). When, as here, probable cause unquestionably existed,³⁰ and the search was executed on a facially valid warrant issued by a neutral and detached magistrate, resort to hypertechnicality would be unjustified.

B. Any Error in the Affidavit was the Result of Innocent Mistake

As noted above, the District Court held a suppression hearing to determine the nature of any misstatements contained in the affidavit for the search warrant. The alleged misstatement related to the representations in the affidavit that the informant had been in the CBS warehouse on March 12th and had then seen the Schick prod-

³⁰ The F.B.I. clearly had "probable cause", independent of the informant's information, at the time the warrant was issued and executed. Agents Dowd and Pecoraro personally observed the appellants taking possession of the stolen Schick products between 12 p.m. and 4 p.m. on the 13th of March. Having obtained a facially valid search warrant from the United States Magistrate on what they believed to be reliable informant information, and having corroborated that information by personal observations, the agents could not reasonably have been expected to act as a reviewing court to determine whether a second warrant should have been obtained before entering the premises.

ucts on the premises. Just before trial in January of 1977, the government learned that the informant, who actually unloaded the stolen truck, had not in fact been in CBS on the 12th of March. After hearing testimony from Agents Colgan and Pecoraro concerning the alleged misrepresentation, the Court concluded that any misstatement to the magistrate was innocent and based upon a reasonable interpretation of the informant's information. Judge Mishler stated:

"Under the pressure of time that Mr. Pecoraro testified to, if we talk about the standard of negligence that usually applies in a negligent act the reasonably prudent FBI agent, and under all of the circumstances, I would make a finding that the agent was not negligent. I don't think that Gonzalez seems to say that performance is required, just that the agent act reasonably under all the circumstances, and I certainly find that both agents did act reasonably, and Agent Colgan misinterpreted the statement that we unloaded and S&F and CBS, and I would think that that's the way I would interpret it, and yes, that is the information he had gotten from Pecoraro in transmitting what Pollari had told him. (418a).

Disregarding Judge Mishler's findings of innocent mistake, appellants cite *United States v. Gonzalez*, 488 F.2d 833 (2d Cir. 1973) and *United States v. Pond*, 523 F.2d 210 (2d Cir.), *cert. denied*, 423 U.S. 1058 (1976), for the proposition that a misrepresentation, if material, requires suppression. This Court has never so held.

Neither *Gonzalez* nor *Pond* held that an innocent misrepresentation to the magistrate requires suppression of evidence otherwise lawfully seized. In each of those cases, the Court, in ruling the misrepresentation to be non-material, implied that far more than an innocent

misstatement would be required before exclusion of evidence would be ordered. Indeed in *Gonzalez*, this Court suggested that something more than negligence on the part of the affiant would have to be shown. 488 F.2d at 838.³¹

An innocent misrepresentation, even if material, thus does not warrant exclusion of competent evidence. The Fourth Amendment proscribes only unreasonable searches and seizures. A warrant based on information

³¹ At least four Circuits have upheld facially valid warrants against attack based upon material misrepresentation innocently conveyed to the Magistrate. *United States v. Lee*, 540 F.2d 1205, 1209 (4th Cir. 1976); *United States v. Luna*, 525 F.2d 4, 7 (6th Cir. 1975); *United States v. Carmichael*, 489 F.2d 983, 987-90 (7th Cir. 1973); *United States v. Marihart*, 492 F.2d 897, 900 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974). See also Kipperman, "Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence", 84 Harv. L. Rev. 825 (1971). But see, *United States v. Morris*, 477 F.2d 657, 662 (5th Cir.), *cert. denied*, 414 U.S. 852 (1973); *United States v. Harwood*, 470 F.2d 322, 325 (10th Cir. 1972), wherein the Courts held that any material misstatement in the affidavit will vitiate the warrant. In *Gonzalez* and *Pond*, this Court appeared to agree with the majority view that at least negligence on the part of the affiant would have to be shown before exclusion of the resulting evidence would be justified. The rationale for that view is set forth in *Luna*, *supra*, where the Court held: "Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. A completely innocent misrepresentation is not sufficient for two reasons. More importantly, the primary justification for the exclusionary rule is to deter police misconduct (See Kipperman, *supra*, at 831, and cases cited therein), and good faith errors cannot be deterred. Furthermore, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken he has probable cause to believe that a crime has been committed. Such errors are likelier and more tolerable during the earlier stages of the criminal process, for issuance of a warrant is not equivalent to conviction", 525 F.2d at 4.

which both the affiant and Magistrate had grounds to credit is *per se* reasonable. *United States v. Kahn*, Dkt. No. 76-2138, Slip Op. 1919 (2d Cir. Feb. 22, 1977); *Mapp v. Warden*, 531 F.2d 1167 (2d Cir. 1976); *United States v. Sulton*, 463 F.2d 1066 (2d Cir. 1972). As this Court stated in *Mapp* "[p]robable cause is not defeated because an informant may have erred or lied, as long as the affiant accurately represented what was told him." 531 F.2d at 1172-73.

Here, neither Agent Colgan nor Agent Pecarraro had reason to believe that the informant information presented to the Magistrate was inaccurate. Accordingly, the appellants have failed to demonstrate any basis for invalidating the search. Judge Mishler properly denied appellants' motions to suppress.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: July 12, 1977

Respectfully submitted,

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* The United States Attorney's Office wishes to express its appreciation to Elizabeth King, a third-year student at Rutgers University School of Law and Scott Himes, a third-year student at Hofstra University School of Law, for their assistance in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19 day of July 19 77 he served ^{2 Copies} a copy of the within
Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Shea, Gould, Climenko & Casey Esqs.

330 Madison Ave. New York, N.Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

19 day of July 19 77

Barbara A. Allen

BARRARA A. ALLEN
Notary Public, State of New York
No. 24-6346824
Qualified in Kings County
Commission Expires March 30, 1979